Bank Pertanian Malaysia v Ahmad Zaki bin Ismail

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–36 OF 2006(W)
NIK HASHIM, ABDUL AZIZ MOHAMAD AND HASHIM YUSOFF FCJJ
22 JANUARY 2009

Labour Law — Employment — Suspension — Suspension pending inquiry — Whether decision of disciplinary committee set up under the Bank Pertanian Act 1969 was null and void — Whether in absence of disciplinary regulations appellant had substantive right to discipline respondent based on common law — Whether there was master and servant relationship between parties

The respondent was a loan supervising officer in the employ of the appellant, a statutory body established under the Bank Pertanian Act 1969 ('the Act'). When charges of misconduct and negligence were levelled against the respondent, the appellant suspended the respondent from work pending an inquiry. Thereafter a domestic inquiry was conducted up by the disciplinary committee ('the DC') set up under s 10B of the Act. Although the DC found the respondent guilty of the charges levelled against him it only issued him with a warning. The respondent filed a writ of summons seeking, inter alia, a declaration that his suspension was null and void and of no legal effect; a declaration that the decision of the DC was null and void and damages. The High Court dismissed the respondent's claim on the grounds that there was no breach of natural justice and that it was an abuse of process of the court for the respondent to by-pass the statutory provision for the procedure of domestic appeal under s 10B(8) of the Act and instead institute proceedings in court to seek the declaratory reliefs. The respondent appealed to the Court of Appeal, which allowed the appeal on the grounds of lack of jurisdiction by reason of the absence of disciplinary regulations. This was the appellant's appeal against that decision. The appellant contended that despite the absence of disciplinary regulations made under s 38A(1) of the Act it had the right under common law to take disciplinary action against the respondent and give him a warning. In reply, the respondent submitted that the common law position advocated by the appellant was not applicable in this case because the relationship between the appellant and respondent was not one of master and servant. Instead the appellant submitted that since he was appointed pursuant to the Act, his tenure was protected by statute. The respondent therefore argued that under s 38A of the Act, the appellant was obliged to make, with the approval of the Minister, disciplinary regulations,

and also create disciplinary officers and punishments and that since no such regulations were made, the disciplinary proceedings were ultra vires. The main issue in this appeal was whether in the absence of disciplinary regulations, the appellant had the substantive right to discipline the respondent based on common law.

Held, allowing the appeal with costs:

(1) (per **Abdul Aziz Mohamad FCJ**) Although the relationship between the appellant and the respondent was not a 'pure master and servant relationship', in that, the relationship involved public employment that gave the respondent a status supported by statute, it was nevertheless a relationship of master and servant. Further, the respondent's argument that no disciplinary action could be taken by the proper disciplinary authority ie the DC because of the absence of disciplinary rules should be rejected (see paras 6 & 8).

(2) (per **Hashim Yusoff FCJ**) The respondent had himself admitted that he was an employee of the appellant and as such there was an employer-employee relationship between them that is similar to a master-servant position so that if the servant does anything incompatible with the due or faithful discharge of his duty to this master, the latter has a right to dismiss him. Thus even if no specific regulations were made pursuant to s 38A of the Act to provide the necessary punishment to be meted out by the DC as an employer, the appellant still had the implied power to impose disciplinary punishment as provided under s 10B(5) of the Act pending the making of the regulations under s 38A (see paras 26–27).

(3) (per **Hashim Yusoff FCJ**) Since the DC was properly constituted under s 10B(1) of the Act it had the power under s 10B(5) of the same to impose such punishment as may be provided for under regulations that may be made under s 38A of the Act. The word 'shall' in s 10B(5) of the Act gives express power for the DC to impose punishment. At the same time the word 'may' is used twice to say what the punishment could be if it was expressly stated pursuant to s 38A. It would not be the intention of the Legislature to give the DC the power to act and yet not give it what punishment to impose and it would be against the intention of the Act that while waiting for the regulation to be made under s 38A, no punishment could be imposed by the DC. In the circumstances that power could reasonably implied to be with the DC (see paras 25 & 28).

(4) (per **Hashim Yusoff FCJ**) The High Court was right to hold that since the respondent had not exhausted his legal remedy under s 10B(8),

which was to appeal in writing to the DC against its decision, his writ action would amount to an abuse of the process of the court (see para 29).

[Bahasa Malaysia summary

Responden adalah pegawai yang menyelia pinjaman yang bekerja dengan perayu, badan statutori yang ditubuhkan di bawah Akta Bank Pertanian 1969 ('Akta tersebut'). Apabila tuduhan salah laku dan kecuaian dikemukakan terhadap responden, perayu menggantung responden daripada bekerja sementara menunggu siasatan. Kemudiannya siasatan domestik dijalankan oleh jawatankuasa disiplin ('JD') yang ditubuhkan di bawah s 10B Akta tersebut. Walaupun JD mendapati responden bersalah terhadap tuduhan yang dikemukakan terhadapnya, JD hanya mengeluarkan amaran terhadapnya. Responden memfailkan writ saman memohon, antara lain, perisytiharan bahawa penggantungannya adalah batal dan tidak sah dan tidak mempunyai kesan undang-undang; perisytiharan bahawa keputusan JD adalah batal dan tidak sah dan ganti rugi. Mahkamah Tinggi menolak tuntutan responden atas alasan bahawa tidak ada kemungkiran keadilan asasi dan bahawa ia adalah penyalahgunaaan proses mahkamah untuk responden melangkau peruntukan statutori untuk prosedur rayuan domestik di bawah s 10B(8) Akta tersebut dan sebaliknya memulakan prosiding di mahkamah untuk memohon relief perisytiharan. Responden merayu kepada Mahkamah Rayuan, yang membenarkan rayuan atas alasan kekurangan bidang kuasa oleh sebab ketiadaan peraturan disiplin. Ini adalah rayuan perayu terhadap keputusan tersebut. Perayu berhujah bahawa walaupun ketiadaan peraturan disiplin yang dibuat di bawah s 38A(1) Akta tersebut ia mempunyai hak di bawah *common law* untuk mengambil tindakan disiplin terhadap responden dan memberikan dia amaran. Di dalam menjawab, responden berhujah bahawa kedudukan *common law* yang dikemukakan oleh perayu tidak beraplikasi di dalam kes ini kerana hubungan di antara perayu dan responden bukan seorang majikan dan pekerja. Sebaliknya, perayu berhujah bahawa memandangkan dia dilantik berikutan Akta tersebut, jawatannya dilindungi oleh statut. Responden oleh itu berhujah bahawa di bawah s 38A Akta tersebut, perayu bertanggungjawab untuk membuat, dengan kelulusan daripada Menteri, peraturan disiplin, dan juga membentuk pegawai-pegawai disiplin dan hukuman dan bahawa memandangkan tiada peraturan sedemikian dibuat, prosiding disiplin adalah ultra vires. Isu utama rayuan ini adalah sama ada di dalam ketiadaan peraturan disiplin, perayu mempunyai hak substantif untuk mendisplin responden berdasarkan *common law*.

Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **Abdul Aziz Mohamad HMP**) Walaupun hubungan di antara

perayu dan responden bukan 'pure master and servant relationship', di mana, hubungan tersebut melibatkan pekerjaan am yang memberikan responden status yang disokong oleh statut, walau bagaimanapun ia adalah hubungan majikan dan pekerja. Selanjutnya, hujahan responden bahawa tindakan disiplin boleh diambil oleh pihak berkuasa disiplin iaitu JD kerana ketiadaan peraturan disiplin patut ditolak (lihat perenggan 6 & 8).

(2) (oleh **Hashim Yusoff HMP**) Responden telah dengan sendirinya mengaku bahawa dia adalah pekerja perayu dan oleh itu terdapat hubungan majikan-pekerja di antara mereka yang serupa dengan kedudukan majikan-pekerja oleh itu jika pekerja berbuat apa-apa yang bertentangan dengan apa yang dikehendaki atau melaksanakan dengan setia tugasnya kepada majikannya, majikannya mempunyai hak untuk memecat dia. Oleh itu, walaupun tidak ada peraturan spesifik dibuat berikutan s 38A Akta tersebut untuk memperuntukkan hukuman perlu yang dikenakan oleh JD sebagai majikan, perayu masih mempunyai kuasa tersirat untuk mengenakan hukuman disiplin seperti yang diperuntukkan di bawah s 10B(5) Akta tersebut sementara menunggu pengubalan peraturan di bawah s 38A (lihat perenggan 26–27).

(3) (oleh **Hashim Yusoff HMP**) Memandangkan JD dibentuk secara betul di bawah s 10B(1) Akta tersebut ia mempunyai kuasa di bawah s 10B(5) Akta tersebut untuk mengenakan hukuman yang mungkin diperuntukkan di bawah peraturan yang mungkin digubal di bawah s 38A Akta tersebut. Perkataan 'shall' di dalam s 10B(5) Akta tersebut memberikan kuasa nyata kepada JD untuk mengenakan hukuman. Pada masa yang sama perkataan 'may' digunakan dua kali untuk menyatakan hukuman apa yang mungkin jika ia dinyatakan dengan jelas berikutan s 38A. Ia bukan niat Perundangan untuk memberi JD kuasa untuk bertindak tetapi tidak memberikan apa hukuman untuk dikenakan dan ia akan bertentangan niat Akta tersebut sementara menunggu untuk peraturan digubal di bawah s 38A, tiada hukuman boleh dikenakan oleh JD. Dalam keadaan ini kuasa tersebut boleh disiratkan dengan munasabah berada pada pihak JD (lihat perenggan 25 & 28).

(4) (oleh **Hashim Yusoff HMP**) Mahkamah Tinggi adalah betul dalam memutuskan bahawa memandangkan responden tidak menggunakan remedi undang-undangnya di bawah s 10B(8), yang mana untuk merayu secara bertulis kepada JD terhadap keputusannya, tindakan writ responden akan merupakan penyalahgunaan proses mahkamah (lihat perenggan 29).]

Notes

For a case on suspension, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) para 1136.

Cases referred to

Attorney General v Great Eastern Railway Company (1880) 5 App Cas 473, HL (refd)

Dundee Harbour Trustees v D & J Nicol [1915] AC 550, HL (refd)

Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia [1981] 2 MLJ 196, FC (not folld)

Malaysian Shipyard and Engineering Sdn Bhd v Bank Kerjasama Rakyat (M) Bhd [1985] 2 MLJ 359; [1985] CLJ (Rep) 206, SC (refd)

Mysore State Road Transport Corp v Gopinath Gundachar Char [1968] 1 SCR 767, SC (refd)

Pearce v Foster (1886) 17 QBD 536 (refd)

Penang Development Corp v Teoh Eng Huat & Anor [1993] 2 MLJ 97; [1992] 3 CLJ (Rep) 204, SC (refd)

Legislation referred to

Bank Pertanian Act 1969 ss 10B(1), (5), (8), 38A, 38A(1), (4)

Appeal from: Civil Appeal No W-02–149 of 1999 (Court of Appeal, Putrajaya)

Edward Saw (YH Teh & Quek) for the appellant.

Karpal Singh (Ramkarpal Singh with him) (Karpal Singh & Co) for the respondent.

Abdul Aziz Mohamad FCJ:

[1] The facts are as set out in the judgment of my learned brother, Hashim Yusoff FCJ.

[2] The appellant's main argument in this appeal hinges on the statement of Lord Esher MR in *Pearce v Foster* (1886) 17 QBD 536 that my learned brother quotes in his judgment. Although that case and that statement were not about the dismissal of a servant who had actually failed to perform his duty to his master duly and faithfully, but were rather about the dismissal of a servant who had placed himself in a position that would prevent him from so performing that duty, it is undeniable that if a servant who has placed himself in such a position may be dismissed, more so would be the position if he has actually failed to perform his duty to his master duly and faithfully. In fact the duty of a servant to give due and faithful service to his master is so fundamental that it goes without saying — and no authority is required for it, although it may be readily inferred from that statement — that at common law a servant who has failed to perform that duty may be dismissed and that a master may take steps to discipline his defaulting servant and may, instead

of dismissing him, give him a warning. Were it otherwise, a master-and-servant relationship would not make sense. The appellant therefore argues in this appeal that despite the absence of disciplinary regulations made under s 38A(1) of the Bank Pertanian Malaysia Act 1969 ('the Act') it had the right under the common law to take disciplinary action against the respondent and give him a warning. If that argument is correct, it would follow that leave-questions (a), (c) and (d), which may be looked at ultimately as one question, should be answered in the affirmative.

[3] The respondent's answer to that argument is not to say that the common law position advocated by the appellant is not correct, but is to say that it is not applicable in this case because the respondent contends that 'the relationship between the appellant and the respondent is not one of master and servant', citing *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196 as authority for that contention.

[4] That case concerned an employee of a university. Under the statutes governing the university, disciplinary powers were vested in the disciplinary committee ('DC'), not in the university council. Although it was the disciplinary committee who initiated disciplinary proceedings against the employee, the decision to terminate his employment was made not by the disciplinary committee but by the disciplinary council. At the material times no statutory disciplinary rules had come into existence. This court decided that the purported dismissal of the employee by the university council was ultra vires its powers.

[5] The university, however, had presented a further argument. It is in reliance on certain bits in the passage in which this court dealt with that further argument that the respondent argues that the relationship between the appellant and him was not one of master and servant. It is necessary to reproduce the entire passage to see what the further argument was, the manner in which this court dealt with it, and the essential point that the passage contains:

> It was further argued that since there were no disciplinary rules at the material time and therefore no disciplinary action that could be taken by the disciplinary committee, the power of disciplinary dismissal was still vested in the university council. As such the university council could dismiss the appellant under the master and servant principle. In *Ridge v Baldwin* [1963] 2 All ER 66 Lord Reid developed the point in an illuminating way. He said, inter alia, that in a pure master and servant case, dismissal is governed by the law of contract inter partes and there is no right to be heard. In other words, in a pure master and servant relationship, the principles of administrative law, including those of natural justice have no part to play. The administrative law remedies, such as a declaration that the dismissal is ultra vires is not available; no order for reinstatement can be made. The most that can be obtained is damages, if the dismissal is wrongful. In *Malloch*

v Aberdeen Corp [1971] 2 All ER 1287, at p 1294, Lord Wilberforce took that point to mean 'cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection'. In cases where such an element is present, Lord Wilberforce pointed out that 'there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared void'. In that case the House of Lords held that a school teacher had a special status conferred on him by statute which converted him from being a public servant holding office at the pleasure of a public authority into a servant who, by virtue of his statutory position, had implied into that position the right to be heard. Lord Wilberforce stated (at p 1294):

> The argument that, once it is shown that the relevant relationship is that of master and servant, this is sufficient to exclude the requirements of natural justice is often found. … A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre.

Lord Wilberforce's speech is important because it opens the way for there to be a general application of the principles of natural justice to the employment relationship.

Clearly this is not a straight-forward case of master and servant. The appellant as an assistant lecturer employed by the university, has a status supported by statute and is entitled to the protection of a hearing before the appropriate disciplinary authority, including the right of appeal to the university council from the decision of that authority. If that right is violated, as happened here, then the court may allow declaratory relief, enabling him to retain his employment, and continued eligibility to be paid his salary and all emoluments from the date of the purported dismissal. The point is, here, the appellant's employment had never been terminated. It would be open to the university at any time hereafter to dismiss him if it so chooses to do and does so in a lawful manner. Until it chooses to do that the appellant's contract of employment will continue. We find it hard to believe that in a field of employment such as the present, the Legislature can really be said to have intended that the appellant is ipso facto to be deprived of his employment without any regard for vested right. To say that there were no disciplinary rules under which he could be charged is an argument which has only to be stated to be rejected.

[6] It is true that in the present case, as in that case, the relationship between the appellant and the respondent was not 'a pure master and servant relationship' but was a relationship involving public employment that gave the respondent 'a status supported by statute'. But this court and the authorities cited by this court in that passage did not say that such a special relationship was not a relationship of master and servant. It was still a relationship of master and servant. The essential point of the passage is that in the case of such a special relationship of master and servant, dismissal of the servant has to be done by observing the principles of natural justice,

otherwise the dismissal is bad and the servant may be reinstated. The respondent's reliance on *Fadzil bin Mohamad Noor* is therefore unavailing.

[7] Incidentally the question of natural justice does not arise in this appeal. It was raised by the respondent in the Court of Appeal but we are informed by the appellant's counsel that the Court of Appeal 'were hardpressed in ascertaining whether there was any breach of natural justice in this case' and instead allowed the respondent's appeal on the ground of lack of jurisdiction by reason of the absence of disciplinary regulations. And in any event this was not a case of dismissal.

[8] The last sentence in the passage is enlightening for the present case. It derides the argument, stated at the beginning of the passage, that no disciplinary action could be taken by the proper disciplinary authority in that case, the disciplinary committee, because of the absence of disciplinary rules.

[9] I would, therefore, answer questions (a), (c) and (d) in the affirmative. Question (b) need not be answered. Since the common law was available to the appellant, it is irrelevant, and it does not call for a determination to dispose of this appeal, whether or not the appellant was under a mandatory duty to make the disciplinary regulations.

[10] I agree with my learned friend that the appeal be allowed with costs, that the orders of the Court of Appeal be set aside, and that the deposit be returned to the appellant.

Hashim Yusoff FCJ:

[11] Four questions were posed to this court in this appeal, as follows:

(a) In general, whether a body created by statute may avail itself of the disciplinary rights and remedies provided by the common law governing an employer-employee relationship in the absence of specific disciplinary regulations or procedures formulated under the statute by which it is established.

(b) In particular, whether the applicant was under a mandatory duty imposed by s 38A of the Bank Pertanian Act 1969 to make its disciplinary regulations, create its disciplinary offences and provide for its disciplinary punishments viz-a-viz its employees.

(c) If the answer to (b) is in the affirmative, whether in the absence of such disciplinary regulations, disciplinary offences and disciplinary punishments, the applicant is entitled to invoke and rely on its common law rights and remedies to discipline the respondent.

(d) If the answer to (c) above is in the affirmative, whether it was an implied term of the respondent's employment with the applicant that the applicant may discipline the respondent by issuing a warning to the respondent.

BRIEF FACTS OF THE CASE

[12] The respondent was a loan supervising officer in the employ of the applicant, Bank Pertanian Malaysia, which is a statutory body established under the Bank Pertanian Act 1969 ('the Act'). By letters dated 15 March 1991 and 25 March 1991, the respondent was suspended from work with full pay pending inquiry into charges of misconduct and negligence which were levelled against him. By a letter dated 13 June 1991, the applicant informed the respondent of its decision to hold a domestic inquiry into the charges levelled against him. On 22 October 1991 a domestic inquiry was conducted by a disciplinary committee set up under s 10B of the Act and the disciplinary committee had found the respondent guilty of the charges levelled against him but issued him a warning only.

[13] The respondent then filed a writ of summons in the High Court, seeking the following declaratory reliefs:

(i) a declaration that the suspension of the respondent pursuant to letters dated 15 March 91 and 25 March 91 were null and void and of no legal effect; and

(ii) a declaration that the decision of the disciplinary committee against the respondent was null and void and of no consequence.

[14] The respondent also prayed for consequential reliefs for damages and costs as per his statement of claim.

[15] Before the learned judge of the High Court, it was agreed between the parties that since the suit involved only questions of law, they would only file in written submissions. There was therefore no trial of this matter and hence no oral evidence was placed before the court.

[16] After hearing and reading the submissions of both parties, the learned High Court judge dismissed the respondent's claim on the grounds that there was no breach of natural justice and hence it was an abuse of process of the court for the respondent to have sought to by-pass the statutory provision for the procedure of domestic appeal of s 10B(8) of the Bank Pertanian Act 1969, by coming to court to seek the declaratory reliefs. Sub-section 8 states:

(8) Any officer or employee of the Bank who is dissatisfied with the decision of the Disciplinary Committee or of any committee delegated with functions, powers or duties under subsection (6) may, within fourteen days, appeal in writing against such decision to the Board which may thereupon affirm, reverse or give such directions on the matter as it deems fit and proper.

[17] The respondent then appealed to the Court of Appeal which allowed his appeal on the ground that since at the material time, no disciplinary regulations were made yet, the disciplinary proceedings were null and void, as it lacked jurisdiction.

[18] Before us, learned counsel for the appellant submitted that the main issue is whether, in the absence of such disciplinary regulations, the appellant had the substantive right to discipline the respondent based on common law. He went on to argue that the DC was properly established under s 10B(1) of the Act. By virtue of s 10B(5) of the Act, the DC was empowered to impose such disciplinary punishment as may be provided for under any regulation that may be made under s 38A, which provides:

Section 38A(1)

The Board may with the approval of the Minister, make such disciplinary regulations as it deems necessary or expedient to provide for the discipline of the officers and employees of the Bank ...

[19] Although admitting that at the material time, there were no disciplinary regulations made yet, learned counsel submitted that there was still the implied right for the DC to act and mete out the appropriate punishment based on common law. Reference was made to the case of *Pearce v Foster* (1886) 17 QBD 536 where Lord Esher MR stated very clearly that:

The rule of law is, that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him.

[20] Further, reliance was placed on the case of *Attorney General v Great Eastern Railway Company* (1880) 5 App Cas 473 where Lord Selborne said

I assume Your Lordships will not now recede from anything that was determined in the *Ashbury Railway Company v Riche*. It appears to me to be important that the doctrine of ultra vires, as it was explained in that case, should be maintained. But I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as

A incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires.

B **[21]** The above statement of the law has been accepted by our courts in the case of *Malaysian Shipyard and Engineering Sdn Bhd v Bank Kerjasama Rakyat (M) Bhd* [1985] 2 MLJ 359; [1985] CLJ (Rep) 206; and in *Penang Development Corp v Teoh Eng Huat & Anor* [1993] 2 MLJ 97; [1992] 3 CLJ (Rep) 204.

C

[22] A similar issue was dealt with by the Indian Supreme Court in the case of *Mysore State Road Transport Corp v Gopinath Gundachar Char* [1968] 1 SCR 767, where it held that:

D In *Dundee Harbour Trustees v D & J Nicol*, Viscount Haldane LC said: 'The answer to the question whether a corporation created by statute has a particular power depends exclusively on whether that power has been expressly given to it by the statute regulating it, or it can be implied from the language used. The question is simply one of construction, and not of presumption.' Bearing in mind this E statement of law, let us consider whether the appellant had the power to appoint officers and servants and to lay down their conditions of service in the absence of regulations framed under s 45(2)(c) of the Road Transport Corporation Act 1950. The appellant is an autonomous corporation incorporated under the Act for the purpose of operating road transport services in the state and extended areas. For the F proper discharge of its functions, it is necessary for the corporation to appoint officers and servants. Section 14(2) expressly confers upon the corporation the incidental power to appoint such officers and servants as it considers necessary for the efficient performance of its functions. Section 19(1)(c) empowers it to provide for its employees suitable conditions of service. Section 14(3) provides that the conditions of appointment and service and the scales of pay of its officers and G servants shall be such as may subject to the provisions of s 34 be determined by regulations under the Act. Section 45(2)(c) empowers the corporation to frame regulations with the previous sanction of the State Government prescribing the conditions of appointment, service and scales of pay of the officers and servants. If the State Government issues any directions under s 34 relating to the H recruitment and conditions of service of the employees, the corporation must obey those directions. The conjoint effect of ss 14(3)(b), 34 and 45(2)(c) is the appointment of officers and servants and their conditions of service must conform to the directions, if any, given by the State Government under s 34 and the regulations, if any, framed under s 45(2)(c). But until such regulations are framed I or directions are given, the corporation may appoint such officers or servants as may be necessary for the efficient performance of its duties on such terms and conditions as it thinks fit. There is necessarily a time-lag between the formation of the corporation and the framing of regulations under s 45(2)(c). During the intervening period, the corporation must carry on the administration of its affairs with the help of officers and servants. In the absence of clear words, it is difficult

to impute to the Legislature the intention that the corporation would have no power to appoint officers and servants to fix the conditions of service unless the regulations under s 45(2)(c) are framed.

[23] Learned counsel for the respondent in his written submission had referred to s 38A(4) of the Act which provides:

> The disciplinary regulations made under this section shall, in prescribing the procedure for disciplinary proceedings, provide for an opportunity for representations to be made by the person against whom disciplinary proceedings are taken before decision is arrived at by the disciplinary authority on the disciplinary charge laid against the such person.

[24] Relying on the case of *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196 it was submitted that since the respondent was appointed pursuant to the Act, his tenure was protected by statute. He further argued that under s 38A, the appellant is obliged to make, with the approval of the Minister, disciplinary regulations, and also create disciplinary officers and punishments. Since no such regulations were made at the material time, then the disciplinary proceedings were ultra vires.

[25] Looking at the provisions of the Act, it cannot be denied that the DC was properly constituted under s 10B(1). The DC under s 10B(5) was given the power to impose such disciplinary punishment as may be provided for under any regulations that may be made under s 38A. Section 10B(8) further provides that '*any officer or employee of the bank who is dissatisfied with the decision of the DC ... may, within fourteen days, appeal in writing against such decision to the board which may thereupon affirm, reverse or give such directions on the matter as it deems fit and proper*'.

[26] In his statement of claim, the respondent himself admitted that he was at all material times a loan supervising officer in the *employ* of the appellant. Therefore he admitted being an employee of the appellant. As such there was an employer-employee relationship between the appellant and the respondent. I am of the view that the position of employer-employee is similar to a master-servant position where, as stated by Lord Esher MR in the case of *Pearce v Foster*, that if the servant does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him.

[27] It is not disputed that at the material time no regulation was made pursuant to s 38A of the Act to provide the necessary punishment to be meted out by the DC. Would the act of the DC in suspending the respondent from work and subsequently giving him a warning, be ultra vires? The Court

of Appeal in this instance, held that the DC lacked jurisdiction because of the absence of the specific regulations to be read under s 38A and thereafter the act of the DC was ultra vires. I am of the view that even if no specific regulation was made to state what punishments could have been given, as an employer, the appellant still had the implied power to impose disciplinary punishment against the respondent, as provided under s 10B(5), pending the making of the punishment regulations under s 38A. As stated by Viscount Haldane LC in *Dundee Harbour Trustees v D & J Nicol* [1915] AC 550, '*the argument to the question whether a cooperation created by a statute has a particular power depends exclusively on whether that power has been expressly given to it by the statute regulating it, or can be implied from the language used*'. In this instant appeal, s 10B(5) provides:

> In the exercise of its disciplinary functions, the DC *shall have the power* to impose such disciplinary punishment as *may* be provided for under any regulations that *may* be made under s 38A.
>
> (Emphasis added.)

[28] It is pertinent to note in s 10B(5) that the word 'shall' is used, thus giving express power for the DC to impose punishment. But at the same time the word 'may' is used twice to say what the punishment could be if it was expressly stated pursuant to s 38A. So if no regulation is made yet under s 38A, does it mean that the DC would be powerless to mete out any punishment at all? I am of the view it would not be the intention of the Legislature to give the DC the power to act yet not give it what punishment to impose. There must necessarily be a time lag between the establishment of the DC and the subsequent regulation to be made giving it the specific punishment that it can impose. It would be against the intention of the Act, that while waiting for the regulation to be made under s 38A, no punishment at all can be imposed by the DC. That power can reasonably be implied to be with the DC. Otherwise potential disciplinary offenders may just get away during the interim period.

[29] In any event, the letters of the general manager, who is also a member of the DC by virtue of s 10B(1), dated 15 March 1991 and 25 March 1991, to the respondent clearly indicated that he was suspended on full pay from 15 January 1991 pending the full enquiry against him. Finally by letter dated 6 May 1992, the chairman of the DC informed the respondent that the punishment imposed on the respondent was warning only. I cannot see how the respondent could have asked for damages if he had been on full pay during his suspension. But that would have been for the trial court to decide. In any event I agree with the decision of the High Court that since the respondent had not exhausted his legal remedy as provided under s 10B(8) by

not appealing in writing to the DC against its decision, therefore it would amount to an abuse of the process of court.

[30] For the reasons given above, I would answer the questions posed as follows:

Question (a) is answered in the affirmative.

Question (b) is answered in the negative, in that it would only be directory on the appellant.

Questions (c) and (d) now do not arise anymore.

[31] My learned brother Nik Hashim bin Nik Ab Rahman FCJ has seen my judgment in draft and has expressed his concurrence

[32] It follows, that this appeal is allowed with costs. The order of the Court of Appeal is set aside. The order of the High Court is restored. Deposit to be returned to the appellant.

Appeal allowed with costs.

Reported by K Nesan